

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ACCEPTANCE INSURANCE
COMPANY,

Plaintiff,

v.

AMERICAN SAFETY RISK
RETENTION GROUP, INC. *et al.*,

Defendants.

Civil No. 08cv1057-L(WMc)

**ORDER DENYING AMERICAN
SAFETY INDEMNITY COMPANY'S
MOTION TO DISMISS**

This contribution action between liability insurers was removed from State court to the United States District Court for the Central District of California. Defendant American Safety Indemnity Company ("ASIC") filed a motion to transfer venue and to dismiss for failure to state a claim. Plaintiff filed a motion to remand. On May 12, 2008 Plaintiff's motion to remand was denied, ASIC's motion to transfer the case to this district was granted, and its motion to dismiss was denied as moot in light of the transfer and without prejudice to refiling after transfer. After the case was transferred to this district, ASIC renewed its motion to dismiss, which Plaintiff opposes.¹ For the reasons which follow, the motion is **DENIED**.

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¹ See Order Regarding Defendant American Safety Indemnity Company's Motion to Dismiss, filed May 5, 2006.

1 Plaintiff, a liability insurer, defended its insured Bay Area Construction Framers, Inc.
2 (“Bay Area”) in the underlying construction defect litigation (“Portola Action”), and paid a
3 settlement in that action. On May 22, 2006 Plaintiff filed a complaint in State court against
4 American Safety Risk Retention Group, Inc. (“ASRRG”) and several Doe Defendants, seeking
5 indemnity, contribution and declaratory relief under California law. (ASIC Ex. K.) On January
6 7, 2008 Plaintiff moved for leave to name ASIC as Doe 1. (Pl.’s Ex. 1.) Over ASSRG’s
7 vehement opposition, the State court granted Plaintiff’s motion. (Pl.’s Ex. 2 (opposition) & 4
8 (order).) On February 7, 2008 Plaintiff filed a first amended complaint naming ASIC as an
9 additional Defendant. (ASIC Ex. L (“First Am. Compl.”).) After removing this case to federal
10 court and transferring venue to this district, ASIC moves to dismiss the first amended complaint
11 pursuant to Federal Rule of Civil Procedure 12(b)(6).

12 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro v.*
13 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). “While a complaint attacked by a Rule 12(b)(6)
14 motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide
15 the grounds of his entitlement to relief requires more than labels and conclusions, and a
16 formulaic recitation of the elements of a cause of action will not do. Factual allegations must be
17 enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*,
18 550 U.S. 544, 555 (2007) (internal quotation marks, brackets and citations omitted). In
19 reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of all factual
20 allegations and must construe them in the light most favorable to the nonmoving party. *Cahill v.*
21 *Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Legal conclusions need not be taken
22 as true merely because they are cast in the form of factual allegations. *Roberts v. Corrothers*,
23 812 F.2d 1173, 1177 (9th Cir. 1987); *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.
24 1981). Similarly, “conclusory allegations of law and unwarranted inferences are not sufficient to
25 defeat a motion to dismiss.” *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th Cir.
26 1998).

27 ASIC argues that the First Amended Complaint is barred by the statute of limitations.
28 The untimeliness must appear beyond doubt on the face of the complaint before a claim will be

1 dismissed as time-barred. *See Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206-07
2 (9th Cir. 1995).

3 Plaintiff does not dispute that the statute of limitations is two years pursuant to California
4 Code of Civil Procedure Section 339 and that it commenced to run on August 16, 2004, when
5 Plaintiff mailed the settlement payment in the Portola Action. (Opp'n at 2.) The parties
6 disagree, however, whether the substitution of ASIC for Doe 1 should relate back to the initial
7 complaint. ASIC does not contend that the initial complaint was untimely.

8 Plaintiff argues that the State court's order granting its motion to name ASIC as Doe 1
9 should be given res judicata effect. Because the order on which Plaintiff relies was made in
10 State court, California law of res judicata applies. *See Kremer v. Chem. Constr. Corp.*, 456 U.S.
11 461, 481-82 (1982). A prior judgment is a pre-requisite for the res judicata doctrine to apply.
12 *See Sutphin v. Speik*, 15 Cal.2d 195, 202 (1940) ("A prior judgment operates as a bar against a
13 second action upon the same cause, but in a later action upon a different claim or cause of action,
14 it operates as an estoppel or conclusive adjudication as to such issues in the second action as
15 were actually litigated and determined in the first action.") Because the order was made in this
16 action and no judgment has been entered, Plaintiff's reliance on res judicata is misplaced.

17 A ruling made in State court is given the same effect after removal as if it had taken place
18 in federal court. *Preaseau v. Prudential Ins. Co. of Am.*, 591 F.2d 74, 79 (9th Cir. 1979); *see*
19 *also Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 530 (9th Cir. 2000). Under proper
20 circumstances, the judge in federal court may overrule the decision made in State court prior to
21 removal. *Fairbank*, 212 F.3d at 530. Plaintiff suggests that anything less than interpreting the
22 State court's order as having decided the statute of limitations issue would be overruling it. The
23 court disagrees.

24 Plaintiff argues that in considering its motion for leave to amend, the State court
25 considered the same statute of limitations arguments as are presented on this motion. While this
26 is correct (*see* Pl.'s Ex. 1 - 3), the State court minute order states only that Plaintiff is given leave
27 to amend, and does not indicate the court's position regarding the statute of limitations (Pl.'s Ex.
28 4). Furthermore, ASIC did not have an opportunity to address these issues before the

1 amendment. Plaintiff's invitation to interpret the State court order granting leave to amend as
 2 precluding a motion to dismiss on statute of limitations grounds is rejected.

3 In the context of amending a complaint to substitute a fictitiously-named defendant,
 4 California law, not the Federal Rules of Civil Procedure, governs whether an amended complaint
 5 relates back to the filing of the original complaint. *See Ortiz v. City of Imperial*, 884 F.2d 1312,
 6 1314 (9th Cir. 1989); *see also Rumberg v. Weber Aircraft Corp.*, 424 F.Supp. 294, 298 (C.D.
 7 Cal. 1976), adopted as the law of the circuit in *Lindley v. Gen Elec. Co.*, 780 F.2d 797, 800 (9th
 8 Cir. 1986) (the court can apply California Code of Civil Procedure Section 474 as substantive
 9 California law pertaining to the statute of limitations). In this regard, Section 474 of the
 10 California Code of Civil Procedure provides in pertinent part:

11 When the plaintiff is ignorant of the name of a defendant, he must state that fact in
 12 the complaint . . . and such defendant may be designated in any pleading or
 13 proceeding by any name, and when his true name is discovered, the pleading or
 proceeding must be amended accordingly

14 If the requirements of section 474 are satisfied, "the amendment is deemed to relate back to the
 15 filing date of the original complaint for purposes of the statute of limitations." *Fireman's Fund*
 16 *Ins. Co. v. Sparks Constr., Inc.*, 114 Cal. App. 4th 1135, 1143 (2004) (internal quotation marks,
 17 brackets and citation omitted). The purpose of section 474 "is to enable a plaintiff to commence
 18 an action before it has become barred by the statute of limitations due to plaintiff's ignorance of
 19 the identity of the defendant. The statute should be liberally construed to accomplish that
 20 purpose." *Dieckmann v. Super. Ct. (Int'l Harvester Corp.)*, 175 Cal. App. 3d 345, 354 (1985).
 21 Section 474 does not require a plaintiff "to exercise reasonable diligence prior to filing the
 22 complaint to discover the defendant's identity or the facts giving rise to a cause of action against
 23 the defendant, but the lack of knowledge of the true name of a defendant must be real and not
 24 feigned." *Snoke v. Bolen*, 235 Cal. App. 3d 1427, 1432 (1991) (internal quotation marks and
 25 citation omitted).

26 ASIC does not dispute that Plaintiff included the requisite Doe allegations in the initial
 27 complaint as required by section 474. Instead, it argues that the First Amended Complaint

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1 should not relate back because Plaintiff knew ASIC's identity prior to the filing of the initial
2 complaint.

3 ASIC maintains that Plaintiff was admonished to do its "homework" in identifying the
4 appropriate party defendant in a previous contribution action related to the Portola Action.² (*See*
5 ASIC Ex. G at 5.) However, this argument goes to Plaintiff's diligence, not knowledge.

6 ASIC also contends that Plaintiff knew its identity because two insurance policies were
7 attached to the initial complaint – one issued by ASRRG and one by ASIC. (ASIC Ex. K.)
8 However, an examination of these exhibits supports Plaintiff's observation that the logos used by
9 ASIC and ASRRG are confusingly similar, both companies use the same address and telephone
10 number, the policies are for immediately consecutive time periods, bear consecutive policy
11 numbers, follow the same format and include essentially the same language. In the complaint,
12 Plaintiff alleged that American Safety Insurance Services, Inc. acted as the program manager for
13 ASIC and ASRRG for purposes of coverage determination and investigation of the tender of
14 defense in the Portola Action. (First Am. Compl. at 4.) Accordingly, the complaint and exhibits
15 attached thereto support a reasonable inference that Plaintiff did not know that ASIC and
16 ASRRG had separate identities. *See Prince v. Jensen Motors, Inc.*, 139 Cal. App. 3d 653 (1983).

17 ASIC also argues that relation back should be precluded because it will be prejudiced by
18 the delay between the initial filing and the amended complaint. It claims, without any detail, that
19 due to the passage of time the case management dates had passed before it was brought into the
20

21 ² When ruling on a motion to dismiss, the court may consider the facts alleged in the
22 complaint, documents attached to the complaint, documents relied upon but not attached to the
23 complaint when authenticity is not contested, and matters of which the court takes judicial
24 notice. *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998), superseded by statute on
25 other grounds as stated in *Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006);
Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994), overruled on other grounds, *Gailbraith*
v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002); *MGIC Indem. Co. v. Weisman*, 803
F.2d 500, 504 (9th Cir. 1986).

26 A matter of public record outside the pleadings may be judicially noticed and considered
27 along with the complaint when deciding a motion to dismiss. *See MGIC Indem.*, 803 F.2d at
28 504. Matters which are not subject to judicial notice, such as, for example, correspondence,
declarations and deposition transcripts are not considered on a Rule 12(b)(6) motion. The
parties relied on such documents, which were attached to pleadings filed in relation to previous
motions. To the extent they relied on correspondence, affidavits and deposition transcripts for
substantive content, they were disregarded for purposes of this motion.

1 case. This is unsupported by the record. Upon granting Plaintiff's motion for leave to amend,
 2 the State court expressly extended the dates to accommodate the new party. (*See* Pl.'s Ex. 4.)

3 Moreover, prejudice is not a blanket bar to the relation-back doctrine. "Once suit has been
 4 filed, unreasonable delay in filing an amended pleading *after discovering a Doe defendant's*
 5 *identity* may bar a plaintiff from using the fictitious name device. To preclude relation back on
 6 this basis, however, the opposing party must show the plaintiff was dilatory and that the
 7 defendant was prejudiced by the delay." *Winding Creek v. McGlashan*, 44 Cal. App. 4th 933,
 8 942-43 (1996) (emphasis added). As discussed above, the record does not support a conclusion
 9 that Plaintiff was dilatory *after* discovering ASIC's identity.

10 A motion to dismiss based on the running of the statute of limitations period must be
 11 denied if the factual and legal issues are not sufficiently clear to permit a determination with
 12 certainty whether the action was timely. *See Supermail Cargo*, 68 F.3d at 1207. Because the
 13 record supports a reasonable inference that Plaintiff did not know of ASIC's separate identity,
 14 ASIC's arguments related to the statute of limitations are rejected.

15 Last, ASIC argues that Plaintiff cannot state a claim for declaratory relief under
 16 California Code of Civil Procedure Section 1060 unless the claim is based on a contract between
 17 the plaintiff and defendant. Section 1060 provides in pertinent part:

18 Any person interested under a written instrument, excluding a will or a trust, or
 19 under a contract, or who desires a declaration of his or her rights or duties with
 20 respect to another . . . may, in cases of actual controversy relating to the legal
 21 rights and duties of the respective parties, bring an original action or
 cross-complaint in the superior court for a declaration of his or her rights and
 duties in the premises, including a determination of any question of construction or
 validity arising under the instrument or contract. . . .

22 While section 1060 allows for a declaration of rights under a contract between the parties to the
 23 declaratory relief claim as ASIC contends, its scope is not so limited.


24 Plaintiff requests a declaration of ASIC's duty to defend and indemnify in the Portola
 25 Action under ASIC's insurance policy with Bay Area. (First Am. Compl. at 7.) The complaint
 26 alleges that there is currently a controversy between Plaintiff and ASIC because Plaintiff alone
 27 defended and indemnified Bay Area in the Portola Action, when ASIC may have had a duty to
 28 do the same. Plaintiff requests a declaration of ASIC's duties toward Bay Area under the policy.

1 Declaratory relief actions between insurers to determine a duty to defend or indemnify based on
2 a policy between one of the insurers and an insured, who is not a party to the lawsuit, are not
3 uncommon. “Declaratory relief may . . . be used to determine the duties of multiple insurers who
4 may have overlapping obligations to the same insured.” Hon. Eileen C. Moore, *et al.*, Cal. Civ.
5 Practice and Proc. ¶ 17:8 (Sep. 2009); *see, e.g., Md. Cas. Co. v. Nat’l Am. Ins. Co. of Cal.*, 48
6 Cal. App. 4th 1822 (1996); *State Farm Mut. Auto Ins. Co. v. Allstate Ins. Co.*, 9 Cal. App. 3d
7 508 (1970).

8 Based on the foregoing, Plaintiff adequately alleged the declaratory relief claim. ASIC’s
9 motion to dismiss is therefore **DENIED**.

10 **IT IS SO ORDERED.**

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12 DATED: March 3, 2010

13 
14 M. James Lorenz
United States District Court Judge

15 COPY TO:

16 HON. WILLIAM McCURINE, Jr.
17 UNITED STATES MAGISTRATE JUDGE

18 ALL PARTIES/COUNSEL
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